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U. S.

SEP 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 361

STANLEY A. JONIKAS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAURICE J. WALSH,
Attorney for Petitioner.

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INDEX.

	PAGE
Petition for Writ of Certiorari	1
Opinion Below	2
Basis of Jurisdiction	2
Questions Presented	2
Statement of Matter Involved	3
Reasons for Allowance of the Writ	7
Conclusion	14
Appendix:	
Statutes Involved	17
18 U. S. C., Sec. 472	17
28 U. S. C., Sec. 2255	17

List of Authorities Cited.

Balodimas v. United States, 177 F. 2nd 485	12
Bollenbach v. United States, 326 U. S. 607, 616	14
Curtis v. Humphrey, 84 F. Supp. 969	13
Ex Parte Atkinson, 84 F. Supp. 300	13
Kenion v. Gill (C. A. D. A.), 155 F. 2nd 176	11
Quercia v. United States, 289 U. S. 466, 469	13
Star v. United States, 153 U. S. 614, 626	13
United States v. Hamilton, 97 F. Supp. 123	13
United States v. Jonikas, 197 F. 2nd 675	2
United States v. Jonikas, 187 F. 2nd 240	4, 12
United States v. Raub, 177 F. 2nd 312	12

Statutes.

Section 472, Title 18, U. S. C. A.	17
Section 2255, Title 28, U. S. C. A.	17

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Stanley A. Jonikas, respectfully prays for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered July 3, 1952, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division.

THE OPINION BELOW.

The Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court, which denied a motion by the Petitioner, under 28 U. S. C. A., Section 2255, to vacate and set aside his sentence in a criminal cause and to release the defendant. The opinion below has been reported as *United States* v. *Jonikas,* 197 F. 2nd 675. It appears in the record at page 27.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Whether the instructions of the trial court were so erroneous and insufficient as to deprive the Defendant of his right to trial by jury?

2. Where instructions are so erroneous and insufficient as to deprive a Defendant of a just trial by jury, does the trial court have jurisdiction to sentence?

3. Where instructions of the Court are so erroneous and insufficient as to deprive the Defendant of his Constitutional right to trial by jury, can the sentence be set aside and a new trial ordered under the provisions of Section 2255, Title 28, U. S. C. A.?

4. Are a judgment and sentence in a criminal cause subject to collateral attack under Section 2255, Title 28, U. S. C., where a Court of Appeals has failed to notice and correct plain and substantial errors in the conduct of a trial, which deprived a Defendant of due process of law and of his right to a trial by jury?

SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioner seeks review of the judgment of the Court of Appeals affirming the denial of his petition brought under Section 2255 of Title 28 U. S. C., which requested the District Court to vacate and set aside the sentence which he is presently serving, on the ground that the sentence was imposed as a result of a trial in which he was denied his right to trial by jury, because the instructions by the Court on his original trial were so improper, insufficient and prejudicial that the jury was deprived of authority to pass upon the issues, and thus the trial court was without jurisdiction to sentence.

The Petitioner was tried before Judge Elwyn R. Shaw and a jury in the District Court for the Northern District of Illinois, commencing June 21, 1950. On June 22, 1950, the jury returned a verdict of guilty, and on June 28, 1950, Judge Shaw sentenced the Defendant to imprisonment for a period of fifteen (15) years (R. 2, 4).

The indictment upon which the trial was had contained eight counts, four of which charged violation of Section 472, Title 18, U. S. C., and alleged that Stanley Jonikas with intent to defraud, and with knowledge of the counterfeit nature of a certain Twenty Dollar ($20.00) note, possessed said note. Each of these four counts was based upon a separate note (R. 5).

The other four counts charged that Stanley Jonikas passed the respective notes on the persons named in the respective counts, with knowledge that they were counterfeit. All of the counts alleged the offenses to have occurred on February 19, 1950, and the passing counts alleged the victims as tavern or club operators in Calumet Park, Illinois (R. 5).

In this jury trial the Petitioner was represented by John P. Coghlan, Esquire, an attorney.

After sentence the Defendant employed a second attorney, John J. Kelly, Jr., who appealed the judgment and sentence to the Court of Appeals for the Seventh Circuit. No attack or question concerning the instructions of the trial court was raised in this appeal on behalf of the Petitioner, and only one question was raised in the appeal, to wit, "Whether the evidence is sufficient to support the judgment" (R. 4).

The Court of Appeals rendered its appeal opinion on February 21, 1951, which opinion is reported as 187 Fed. 2nd 240. The opinion only discussed the sufficiency of the evidence and made no reference to the instructions.

After the mandate of the Court of Appeals issued, and the cause was returned to the District Court, the Petitioner, through attorney, John J. Kelly, Jr., filed motions for new trial on the ground of newly discovered evidence and for reduction of sentence. Judge Shaw, the trial Judge, died before the Court of Appeals handed down its decision, and the case was assigned to Judge Walter J. LaBuy of the District Court and he ordered a reduction of the sentence from fifteen (15) years to seven and one-half (7½) years (R. 4).

The Petitioner commenced service of his sentence in June of 1951 and is presently serving the sentence. On June 29, 1951, the Petitioner by his present attorney filed a motion and petition under Section 2255 of Title 28, U. S. C. to vacate and set aside the sentence, on the ground that the sentence was subject to collateral attack because the trial court's instructions to the jury were so inadequate and so improper that the Petitioner was denied his right to trial by jury and due process of law (R. 3).

The Government did not answer this Petition, but contested its legal conclusions by brief.

The Petition describes the evidence on the trial as follows:

> "The evidence of the Government tended to show that the Defendant, in the early morning hours of February 19, 1950, presented Four (4) Twenty ($20.00) Dollar notes in various taverns and liquor establishments in Calumet Park, Illinois, in payment for drinks of alcoholic liquor in said places; that the Defendant was under the influence of liquor, and that the notes were counterfeit. That the Defendant was apprehended in the fourth establishment in which he had presented one of these bills, and that search of the Defendant, and of his home, disclosed that he had about $250.00 additional in his pocket and that at home he had about $310.00 in currency, none of which was counterfeit.
>
> "The Defendant testified in his own behalf and stated that he was quite drunk when the transactions in question occurred, because he had visited several other drinking establishments other than the four in question, and that although he admitted that he may have passed the bills in question, he did not know whether he had, and he further stated that he did not know whether they were counterfeit, and that he had no knowledge that they were counterfeit at any time, other than the allegations and knowledge acquired by reason of his arrest and the charges brought against him, and that he had no intent to defraud. The testimony further showed that the Defendant either repaid or had permitted for repayment from his funds, any amounts given the recipients of the bills. The Defendant testified that if he had the bills, he probably received them in a dice game at the Stock Yards, without knowing they were counterfeit" (R. 5, 6).

The petition sets forth the instructions in full (R. 6-9). Thereafter the petition contains statements of the Petitioner's points of complaint concerning the instructions, and a request for relief.

On the same date the petition was filed, Judge LaBuy of the District Court granted leave to the Government to answer or plead to the motion within twenty (20) days. No answer or other pleading was filed by the Government. Time was fixed within which the parties should file briefs and the Petitioner and the Defendant filed their respective briefs and the Court thereafter filed its memorandum on opinion denying the motion (R. 14, 15).

The Court of Appeals below rendered the opinion and judgment on July 3, 1952 (R. 27).

REASONS FOR ALLOWANCE OF WRIT.

I.

This case presents to the Court the question as to whether plain, substantial and fundamental errors in instructing a jury can so prejudice a Defendant that he is deprived of his right to trial by jury and to due process of law as prescribed by the Constitution.

It is urged that this question of importance should be decided by this Court.

The circumstances in the case at bar are unusual. It is acknowledged by the Petitioner, that his attorney, upon his trial before the District Court, made no offer of instructions. It is a further fact that the United States Attorney presented no suggested instructions to the trial court. No objections were made to the instructions, as given, within the time specified by the Rules of Criminal Procedure. The Petitioner was represented by a second attorney on his appeal from his sentence. Only one question was presented to the Court of Appeals on the Petitioner's behalf. This was the question of the sufficiency of the proof.

It is apparent from the opinion of the Court of Appeals deciding the appeal, that the propriety and sufficiency of the trial court's instructions to the jury were not urged upon, or considered by the Court of Appeals (187 F. 2nd 240).

The attorney, who presented the appeal apparently felt that he could not assign as error any portion of the charge, or omission therefrom, because no proper objection had been made before the jury retired, by his predecessor as

the Defendant's attorney. No attempt was made to induce the Court of Appeals to notice plain error, and it is apparent that the plain error, that existed by reason of the trial court's instruction, was not noticed by the Court of Appeals, or given attention or effect in its opinion and judgment.

The Petitioner acknowledges that "ordinary" procedural defects, not raised in the trial court or in the Court of Appeals do not open a judgment to a collateral attack, in a motion such as the one at bar.

The Petitioner contends that the extraordinary procedural defects occurring by reason of the insufficient and erroneous instructions to the jury, in this case, were so prejudicial that the jury was deprived of its functions, the verdict was invalid, and the judgment and sentence are subject to collateral attack under Section 2255, Title 28, U. S. C.

The Petitioner was tried before a jury upon his plea of not guilty to the charges stated in the eight counts of the indictment. This placed in issue, for decision by the jury all of the material allegations of the eight counts of the indictment.

II.

The trial court's charge to the jury deprived the jury of the function of passing upon these issues, and prejudiced the Petitioner in the eyes of the jury as follows:

(a) The Court failed to instruct the jury that the Defendant was on trial on eight separate counts and charges, and that his guilt or innocence was to be determined as to each count.

(b) The Court failed to describe the charges in these eight counts, and to inform the jury what elements of the offenses must be proved, to support a verdict of guilty.

There is no mention, in the instructions, of the necessity of proving an intent to defraud, which is a necessary element of each offense alleged in the eight counts. There was no description of the statute defining offenses and thus, the case was submitted to the jury without the submission of the issue of intent to defraud. Although the Defendant was tried on a plea of not guilty and the Petitioner testified that he did not know whether he had passed the counterfeit bills in question, because he was intoxicated at the time, the trial court took this question from the jury by saying:

> "As to the passing, I do not think there is any great amount of question in the evidence that he did pass these bills at the places indicated. So it narrows itself down pretty much in this case to the question of whether or not he knew these bills to be counterfeit" (R. 6).

(c) The trial court improperly instructed the jury on the question of reasonable doubt, when it stated in three places in the brief instructions:

> (1) "It does not mean you must hunt for doubts where none exists"; (R. 8)
> (2) "It does not mean you should find doubts when none exists"; (R. 8)
> (3) "You are not supposed to go out and hunt for doubts. Your oath does not require that" (R. 8).

These qualifications effectively told the jury that there was no doubt of the Petitioner's guilt.

(d) The trial court prejudicially argued for a verdict of guilty by stating:

> "If the evidence satisfies you to a moral certainty that the Defendant is guilty then your conscience should not bother you any about finding him guilty" (R. 8).
>
> "You are to arrive at the truth. That is what you

are here for. Having arrived at it, act fearlessly and without any feeling of remorse, or anything else" (R. 9).

These admonitions to the jury were only expressed in connection with authority to find the Defendant guilty. There was no similar admonition with regard to the duty to find the Defendant not guilty in the event of a failure of proof or reasonable doubt thereof.

(e) The Court failed to instruct the jury that the burden of proof was upon the Government to prove the allegations of the indictment beyond reasonable doubt, and that the Defendant bore no burden whatsoever.

No instruction whatsoever was given regarding the presumption of innocence.

Despite the failure to instruct regarding the presumption of innocence and the burden of proof, the trial court devoted a large part of the charge to a discussion of the weight to be given to the Defendant's testimony and singled out the Defendant in this regard, so that, in effect, the jury was warned to be extremely careful about accepting the testimony of the Defendant. No such detailed discussion of the Government's witnesses, or the standards by which their testimony should be judged was included (R. 8, 9).

(f) In the supplement to instructions (R. 9), the trial court said,

"The Court: Are you both satisfied with the instructions I have given the jury?

Mr. Cohen: I am.

Mr. Coghlan: On the matter of mere possession of the money.

The Court: If I haven't made it clear I should make it clear that mere possession of this money without knowledge of its counterfeit nature would not be an offense. It must be accompanied with knowledge

of the fact that it is counterfeit. . In that connection
you have a right to consider whe here the money came
from, all the facts and circumstan ances surrounding it,
how it is supposed to have gotten n into his possession,
the truth or untruth of his story a about the crap game
in the alley—*anything else that t you want to con-*
sider. You are to arrive at the t truth. That is what
you are here for. Having arrived d at it, act fearlessly
and without any feeling of remors rse, or anything else.
If that is all—
Mr Coghlan: That is all." (E Emphasis supplied.)

This supplement which included the e instructions to con-
sider, "Anything else that you want t to consider", and
the direction that the jury should a act "fearlessly and
without any feeling of remorse or anyt ything else" was the
last word of the Court to the jury, and d in the view of the
Petitioner was, of course, erroneous, and, in effect, told
the jury that the Defendant's "story ", and its truth or
untruth was the real basis for decision.

This shifted the burden of proof fr rom the Government
to the Defendant.

III.

In the case at bar, the Petitioner cite d the case of *Kenion*
v. *Gill*, (C. A. D. A.) 155 F. 2d 176, w where the charge to
the jury was questioned in a petition for habeas corpus.
In that case, the Court of Appeals for the District of
Columbia held that a failure to define a reasonable doubt
was not such a denial of due process, that the Court was
deprived of jurisdiction to sentence.

In the case at bar, the Court of App peals below has held
that the many inadequacies and erro rs in the charge do
not justify relief under Section 2255 of Title 28, U. S. C. A.

The Petitioner knows of no case w here relief has been
granted on habeas corpus or under Section 2255, Title 28,
because of failure to give proper inst ructions to the jury.

The Petitioner urges, however, that the errors and inadequacies of the instructions complained of here are so gross and so obvious that it should be apparent that the Defendant's case was not properly submitted to the jury and that the verdict, which supports the judgment, was not reached under the standards required by due process of law.

The Government has argued below, and the Court of Appeals has adopted the theory that the errors complained of are procedural errors which could only be reached by appeal.

The Petitioner admits that the errors are procedural, and admits that they could have been urged upon appeal. The Petitioner also contends that they are errors of such substantial prejudice that they deprived the Petitioner of fundamental rights and thus, are open to collateral attack. They are errors of such plain and substantial nature that the Court of Appeals could have noticed and acted on them, on its own motion.

District Courts have directed new trials as relief on petitions under Section 2255, Title 28, in many instances. Counsel for the Petitioner has found no particular case, on all fours with the one at bar. This is probably because the facts in this case are unique. It is unlikely that any other court has ever instructed in such flagrant disregard of the right to trial by jury and due process of law. In many cases of reversals for erroneous instructions on appeal, even though no exception was saved in the trial court, the Courts of Appeal have noticed the substantial errors, such as the ones in the case at bar, and have reversed for them. *Balodimas* v. *U. S.*, 177 F. 2d 485; *U. S.* v. *Raub*, 177 F. 2d 312.

In the case at bar, the first decision of the Court of Appeals appears as *U. S.* v. *Jonikas*, 187 F. 2d 240. The

opinion of the Court disposes of no question other than the sufficiency of the evidence, and it is obvious from the briefs of the parties and the Court's opinion, that no question as to the instructions was raised or considered, and that the Court of Appeals, in this case, did not notice the plain and prejudicial errors affecting the Defendant's Constitutional rights.

Convictions have been set aside on collateral attack by District Courts for errors such as pleading guilty on the marshal's recommendation and statement that he would intercede with the judge, *Curtis* v. *Humphrey*, 84 F. Supp. 969; pleading guilty to transporting stolen vehicles, where it was later determined that the automobile was not stolen but obtained by means of a false check, *Ex Parte Atkinson*, 84 F. Supp. 300. In a case where the Court made remarks in the presence of the jury, and where the prosecutor made remarks in the presence of the jury, concerning the Defendant's right to testify, or not, a new trial was granted under Section 2255, Title 28, in the case of *U. S.* v. *Hamilton*, 97 F. Supp. 123. Many other instances, in which the relief has been granted for various causes, exist.

It is sincerely contended, that the conduct of the trial court in this case, in its instructions to the jury, was such that the right of trial by jury was taken from the Defendant. The Supreme Court has said "In a trial by jury in a Federal Court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and determining questions of law." *Quercia* v. *U. S.*, 289 U. S. 466, 469; and "The influence of the trial judge on the jury is necessarily and properly of great weight." *Starr* v. *U. S.*, 153 U. S. 614, 626.

Jurors are ever watchful of the words that fall from the Court. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. From presuming,

too often, all errors to be "prejudicial the judicial pendu-
lum need not swing to presuming all rors to be "harm-
less". In view of the place of imp tance the trial by
jury has in our Bill of Rights, it is ot to be supposed
that Congress intended to substitute e belief of judges
in the guilt of an accused, however ju fiably engendered
by the record, for estimation of guilt y the jury under
appropriate judicial guidance, howev cumbersome that
process may be. See *Bollenbach* v. *U. S.*, 326 U. S. 607, 616.

Conclusion.

It is respectfully urged that the structions of the
trial court were deficient in that they id not inform the
jury of the nature of the charges aga st the Defendant,
and did not afford to him the protect n of fundamental
and historic rights, including the presu tion of innocence.
It is further contended that the instr tions of the court
were erroneous with regard to reason le doubt, circum-
stantial evidence, and the description of tandards by which
testimony of witnesses should be weig d, and in the em-
phasis and repetition with regard to t Defendant's tes-
timony; it is further contended that th instructions were
prejudicially argumentative and were actically directive
of a verdict of guilty. The jury was t properly guided
and directed to deliberate on guilt or in ocence in this case.

The unusually long sentence imposed by the trial Judge,
fifteen years, was later reduced by an ther Judge of the
District Court, to seven and one-half years, on the pre-
sentation of affidavits showing that he Defendant was
known in the places where the counter eit was alleged to
have been passed. It is urged that his Defendant was
deprived of a fair trial by jury, und r proper judicial
process, and was not afforded complet review, and that

therefore the judgment of conviction should be set aside and a new trial ordered.

No harm can accrue to the United States from such action. All of the witnesses who testified would be available.

It is respectfully prayed that this Court grant its Writ of Certiorari, so that the judgment of the Court of Appeals may be reviewed and reversed.

Respectfully submitted,

MAURICE J. WALSH,
Attorney for Petitioner.

APPENDIX.

Title 18, U. S. C. A., Section 472:

UTTERING COUNTERFEIT OBLIGATIONS OR SECURITIES.

Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both. June 25, 1948, c. 645, 62 Stat. 705.

Title 28, U. S. C. A., Section 2255:

FEDERAL CUSTODY; REMEDIES ON MOTION ATTACKING SENTENCE.

A prisoner *in custody* under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon,

determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. June 25, 1948, c. 646, 62 Stat. 967, amended May 24, 1949, c. 139, Sec. 114, 63 Stat. 105.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	4
Conclusion	5

CITATIONS

CASES:

Adams v. *United States ex rel. McCann*, 317 U.S. 269	4
Cash v. *Huff*, 142 F. 2d 60, certiorari denied, 323 U.S. 747	4
Collins v. *McDonald*, 258 U.S. 416	4
Matter of Moran, 203 U.S. 96	4
Morton v. *Welch*, 162 F. 2d 840, certiorari denied, 332 U.S. 779	4
Sunal v. *Large*, 332 U.S. 174	4
United States v. *Jonikas*, 187 F. 2d 240	2

STATUTES:

18 U.S.C. 472	2
28 U.S.C. 2255	2

In the Supreme Court of the United States

OCTOBER TERM, 1952

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STANLEY A. JONIKAS, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 27-36) is reported at 197 F. 2d 675.

JURISDICTION

The judgment of the Court of Appeals was entered on July 3, 1952 (R. 37). The petition for a writ of certiorari was filed September 27, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner can collaterally attack a judgment of conviction by a motion under 28 U.S.C. 2255 on the basis of alleged errors in the trial court's instructions.

STATEMENT

An eight-count indictment returned in the United States District Court for the Northern District of Illinois charged petitioner with possessing and passing counterfeit bills, in violation of 18 U.S.C. 472. Following a trial by jury, petitioner was found guilty and sentenced to imprisonment for a period of fifteen years (R. 2). Upon appeal, the Court of Appeals for the Seventh Circuit affirmed the judgment of conviction rejecting petitioner's sole contention at that time, that the evidence was insufficient to support the conviction (R. 2). *United States* v. *Jonikas*, 187 F. 2d 240. Thereafter the trial court reduced petitioner's sentence to imprisonment for seven and a half years. (R. 2.)

The present proceeding was initiated when petitioner filed a motion to vacate under 28 U.S.C. 2255 in which he alleged that errors in the trial court's instructions deprived him of a fair trial (R. 3-14). Petitioner admitted that there was evidence that at four different taverns he gave a counterfeit twenty-dollar bill in payment for drinks; that at the trial, in testifying in his own behalf, he admitted that he may have passed

counterfeit money but denied hat he knew the money was counterfeit; and tat the judge instructed the jury that in order t convict him they had to find that defendant did have such knowledge (R. 5-7). He also admited that his trial counsel did not propose suggsted instructions or reserve an exception to the given (R. 12.) Nevertheless, he argued, the instructions were deficient in a number of respects, among which were:

1. the failure to distinguish among the eight counts (four for possessing and four for passing the four different bills) (R. 11-2).

2. the failure to instruct on ntent to defraud (R. 10).

3. the court's statement tha since there was little question as to the passing f counterfeit the case narrowed down to the is e of knowledge (R. 10).

4. improper instructions o circumstantial evidence and reasonable doubt (. 10, 11).

5. the fact that special instru tions were given on the factors to be considered i weighing the defendant's testimony (R. 11).

6. the failure to instruct on t presumption of innocence (R. 12).

The trial court denied the m on to vacate on the ground that the record in t s case did "not show such a denial of right t a fair trial or

deprivation of constitutional rights as to render the sentence subject to collateral attack" (R. 15-17). The Court of Appeals affirmed the trial court's judgment (R. 37).

ARGUMENT

Petitioner's sole contention (Pet. 7-8) is that the alleged errors in the instructions were so prejudicial as to deprive him of his right to a trial by jury. Petitioner shows the lack of merit in his own contention when he states (Pet. 11) that he "knows of no case where relief has been granted on habeas corpus or under Section 2255, Title 28, because of failure to give proper instructions to the jury." As pointed out by both the court below (R. 28-29) and the District Court (R. 15-17), alleged trial errors of this nature are cognizable on appeal, not on habeas corpus or on motions to vacate. See *Sunal* v. *Large*, 332 U.S. 174; *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 274; *Collins* v. *McDonald*, 258 U.S. 416, 420-421; *Matter of Moran*, 203 U.S. 96, 105; *Morton* v. *Welch*, 162 F. 2d 840 (C.A. 4), certiorari denied, 332 U.S. 779; *Cash* v. *Huff*, 142 F. 2d 60 (C.A. 4), certiorari denied, 323 U.S. 747. Accordingly it is unnecessary here to consider whether the instructions were deficient as urged by petitioner. Suffice it to say, that the instructions as a whole (R. 6-9), when read together with the evidence adduced in this case, fairly presented the issues to the jury, and

would not have presented a basis for reversal even upon direct appeal, particularly in view of the fact that no objections were made to the instructions by defendant's counsel. See opinion below (R. 27-36).

CONCLUSION

It is therefore respectfully submitted that the petition for certiorari should be denied.

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